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THE *INDIAN ACT*

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THE *INDIAN ACT*

1876–1996: A VERY BRIEF HISTORY

Subsection 91(24) of the *Constitution Act, 1867*[1] granted Parliament legislative authority over "Indians, and Lands reserved for the Indians." In 1876, the first consolidated *Indian Act* reflected the government's preoccupation with land management, First Nations membership and local government, and the ultimate goal of assimilation. Today, despite numerous legislative changes – notably in 1951 and 1985 – the 1876 framework has been preserved fundamentally intact. The *Indian Act*[2] remains the principal vehicle for the exercise of federal jurisdiction over "status Indians," and governs most aspects of their lives. It defines who is an Indian and regulates band membership and government, taxation, lands and resources and money management, among other matters.

First Nations have long objected to the inherent paternalism of the *Indian Act*, whose imposed regime they view as fundamentally ill-suited to their needs and aspirations. Government officials also acknowledge the Act's limitations as a framework for relations with First Nations. While serving as an instrument of assimilation and external regulatory authority, however, the Act has also provided certain protections for First Nations. These conflicting roles, together with the differing views of Aboriginal self-government held by federal authorities and First Nations in the modern constitutional context, intensify the complexities of *Indian Act* reform.

1996–2009: OVERVIEW OF DEVELOPMENTS

Some ongoing processes aimed at removing specific First Nations communities or groups of communities from the application of at least some *Indian Act* provisions occur in the

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1 *The Constitution Act, 1867* (U.K.), 30 and 31 Victoria, c. 3.

2 R.S.C. 1985, c. I-5.

context of self-government negotiations. Selected processes included below that are in this category are largely sectoral or limited in scope.[3]

- In 1996, Bill C-79, the Indian Act Optional Modification Act, proposed numerous "interim" modifications. First Nations opposed this initiative, and the bill died on the *Order Paper* when Parliament was dissolved in April 1997.

- In 1998, Parliament enacted the *Mi'kmaq Education Act*,[4] giving effect to the *Final Agreement with respect to Mi'kmaq Education* in Nova Scotia. This was the first agreement to provide for the transfer of jurisdiction over education. Under the Act, education sections of the *Indian Act* ceased to apply to affected communities. Sectoral self-government negotiations related to education are well advanced with groups representing First Nations communities in Ontario, such as the Nishnawbe-Aski and Anishinabek Nations, that also seek law-making authority over education outside the *Indian Act*.

  In 2002, the final report of the Minister's National Working Group on Education[5] stated that "the jurisdiction that First Nations require to govern and manage the education of their learners should be exclusive and all encompassing." In 2006, Parliament enacted the *First Nations Jurisdiction over Education in British Columbia Act*,[6] effective November 2007, which establishes a First Nations Education Authority, authorizes agreements with individual First Nations communities with respect to jurisdiction over education, and provides that education provisions in the *Indian Act* will not apply to participating communities.

  The Department of Indian Affairs and Northern Development (DIAND) intends to pursue additional tripartite partnerships aimed at improving educational outcomes for First Nations

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3 A summary review of developments related to more broadly based self-government negotiations and agreements, under which the *Indian Act* largely ceases to apply to affected groups, can be found in Mary C. Hurley, *Aboriginal Self-Government*, TIPS-85E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 19 April 2005, http://lpintrabp.parl.gc.ca/apps/tips/printable/tip85-e.pdf. See also Department of Indian Affairs and Northern Development, *General Briefing Note on Self-Government and Claims Policy of Canada and the Status of Claims*, February 2009.

4 S.C. 1998, c. 24.

5 Minister's National Working Group on Education, *Our Children – Keepers of the Sacred Knowledge: Final Report of the Minister's National Working Group on Education*, Commissioned by the Department of Indian Affairs and Northern Development, December 2002, http://dsp-psd.pwgsc.gc.ca/Collection/R41-9-2002E.pdf.

6 S.C. 2006, c. 10.

students, as evidenced by the April 2008 tripartite Memorandum of Understanding Concerning Education and First Nations Students and Communities in the Province of New Brunswick,[7] and the December 2008 announcement of the opt-in Education Partnerships Program.[8] It is not clear whether implementation of tripartite arrangements may include federal legislation.

- In 1999, the *First Nations Land Management Act* (FNLMA)[9] gave effect to the 1996 Framework Agreement on First Nations Land Management between 14 First Nations communities from six provinces and the Minister of Indian Affairs. The agreement was to give participants control over reserve lands and resources, and end ministerial discretion under the *Indian Act* over land management decisions on reserves. Land-related provisions of the *Indian Act* cease to apply to signatory communities that enact a land code consistent with the terms of the FNLMA. Since the FNLMA's adoption, numerous additional First Nations communities have signed on to the Framework Agreement and been added to the FNLMA schedule by Order in Council. Over 20 First Nations communities have ratified land codes in place; 58 are listed in the Schedule to the FNLMA

- The 1999 ruling of the Supreme Court of Canada in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*[10] held that subsection 77(1) of the *Indian Act* denying off-reserve First Nations members the right to vote in band elections held under the Act violated the equality rights provision of the *Canadian Charter of Rights and Freedoms* (the Charter). Accordingly, amendments to the *Indian Band Election Regulations* and *Indian Referendum Regulations* came into effect in October 2000. *Corbiere* was generally considered inapplicable to "custom" electoral processes in effect in over 50% of First Nations communities. In the 2007 *Esquega* decision,[11] the Federal Court ruled that the residency requirement for

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7 A copy of the memorandum is available at Department of Indian Affairs and Northern Development, *Memorandum of Understanding Concerning Education and First Nations Students and Communities in the Province of New Brunswick*, http://www.ainc-inac.gc.ca/ai/mr/nr/j-a2008/2-3025-mou-eng.asp.

8 For information on the program, see Department of Indian Affairs and Northern Development, *Education Partnerships Program Overview*, http://www.ainc-inac.gc.ca/edu/ep/epp-eng.asp.

9 S.C. 1999, c. 24.

10 [1999] 2 S.C.R. 203.

11 *Esquega* v. *Canada (Attorney General)* 2005 FC 1097, 10 August 2005, http://decisions.fct-cf.gc.ca/en/2005/2005fc1097/2005fc1097.pdf.

candidacy for band council positions at subsection 75(1) of the *Indian Act* was also contrary to section 15 of the Charter. The Court issued a suspended declaration of invalidity of the provision that was narrowed by the Federal Court of Appeal in May 2008 to apply only to the residency portion.[12]

- DIAND's response to the *Corbiere* decision calling for a longer-term, broader electoral reform and possible additional adjustments to the *Indian Act* resulted in the most recent proposal to reform the *Indian Act* regime. In 2001, the then Minister of Indian Affairs initiated Communities First: First Nations Governance, described as a process for developing legislation to enable more efficient administration of First Nations communities, pending self-government. Despite the reservations expressed by the Assembly of First Nations (AFN) and affiliated groups, the initiative was followed by the introduction in 2002 of Bill C-7, the First Nations Governance Act.[13] It proposed to modify the statutory regime applicable to all *Indian Act* First Nations communities, primarily by setting out requirements related to "governance" codes for leadership selection, government administration and financial accountability. The bill would not have replaced the *Indian Act*, but would have made consequential amendments to it.

  A large majority of First Nations leaders and individuals, legal experts, church groups and others were highly critical of the legislation on a number of grounds. Some First Nations witnesses supported Bill C-7 as a needed incentive to enhance government accountability to community members. Bill C-7 died on the *Order Paper* with the prorogation of Parliament in November 2003 and was not reintroduced.

- A long-standing concern of First Nations women has been that the *Indian Act*, which governs real property on reserves, does not deal with the division of matrimonial real property (MRP) on relationship breakdown. In 2003, a report of the Standing Senate Committee on Human Rights recommended that the government proceed with immediate remedial amendments to the *Indian Act* to provide for the application of provincial and territorial matrimonial property

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12 *Canada (Attorney General)* v. *Esquega* 2008 FCA 182, 15 May 2008, http://decisions.fca-caf.gc.ca/en/2008/2008fca182/2008fca182.pdf.

13 A copy of Bill C-7, An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts (short title: First Nations Governance Act), is available at http://www2.parl.gc.ca/content/hoc/Bills/372/Government/C-7/c-7_2/c-7_2.pdf.

laws on reserves.[14] In 2005, the House of Commons Standing Committee on Aboriginal Affairs recommended similar action, as well as a longer-term legislative approach acknowledging First Nations law-making capacity in the area.[15] In fall 2006, the appointed Ministerial Representative on MRP undertook a consultative process on the issue, in collaboration with the AFN and the Native Women's Association of Canada (NWAC). Her March 2007 report called for a two-part legislative framework involving recognition of First Nations communities' inherent jurisdiction over the issue, and the application of interim federal rules pending the adoption of community laws.[16]

In March 2008, government legislation introduced as Bill C-47, the Family Homes on Reserves and Matrimonial Interests or Rights Act, broadly reflected aspects of that general scheme. The "stand-alone" legislation did not propose amending the *Indian Act*, or altering the status of reserve lands under that Act. Neither NWAC nor the AFN Women's Council supported the bill, the former suggesting that "nonlegislative solutions are necessary to make the rights in the legislation real for communities." Bill C-47 died on the *Order Paper* with the dissolution of the 39th Parliament in September 2008 and was reintroduced unchanged as Bill C-8 in February 2009. In May 2009, a joint release by NWAC, the AFN and the AFN Women's Council called for the bill to be withdrawn, stating that it takes a "one dimensional approach to a complex problem that does not address the real issues in communities," and "attempts to pit the individual rights of women against the collective rights of First Nations people."[17]

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14 Senate, Standing Committee on Human Rights, *A Hard Bed To Lie In: Matrimonial Real Property on Reserve*, November 2003, http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep08nov03-e.pdf.

15 House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Walking Arm-In-Arm To Resolve the Issue of On-Reserve Matrimonial Real Property*, June 2005, http://www2.parl.gc.ca/content/hoc/Committee/381/AANO/Reports/RP1906551/aanorp05/aanorp05-e.pdf.

16 Wendy Grant-John, *Report of the Ministerial Representative: Matrimonial Real Property Issues on Reserves*, 9 March 2007 http://www.collectionscanada.gc.ca/webarchives/20071125013543/; http://www.ainc-inac.gc.ca/wige/rmr/rmr_e.pdf.

17 "NWAC, AFN and AFN Women's Council Unite to Oppose Bill C-8 on Matrimonial Real Property," News release, 14 May 2009, http://www.nwac-hq.org/en/documents/09-5-12JointPRMRP2ndReadingFINAL.pdf.

- When Newfoundland joined Confederation in 1949, Innu and Mi'kmaq First Nations communities in the region were not recognized under the *Indian Act*. In 1984, the Miawpukek First Nation of Conne River was the first to receive recognition. In 2002, Labrador's Mushuau Innu First Nation and Sheshatshiu Innu First Nation became *Indian Act* "bands" by Order of the Governor in Council. In 2003, the Federation of Newfoundland Indians (FNI), Canada, and Newfoundland and Labrador entered into negotiations concerning the status of the province's nine Mi'kmaq communities, which remained unrecognized. In 2007, Canada and the FNI reached the Agreement for the Recognition of the Qalipu Mi'kmaq Band, which provides for the creation of a landless *Indian Act* band.[18] FNI members ratified the Agreement in May 2008; the enrolment of eligible Mi'kmaq is expected to be completed in 2010.

- The *First Nations Fiscal and Statistical Management Act* (FNFSMA)[19] enacted in 2005 establishes an institutional framework to provide First Nations communities with the tools to address economic development and fiscal issues on-reserve, including through property taxation. The legislation applies largely on an explicit opt-in basis. Communities wishing to put taxation measures in place may choose whether to do so under the *Indian Act* or the FNFSMA. The Act stipulates that *Indian Act* provisions authorizing property taxation and related by-laws do not apply to First Nations communities listed in the FNFSMA's schedule, which currently number over 50. Non-scheduled communities retain the ability to enact property taxation under the authority of the *Indian Act*.

- The *Indian Act* governs the management of Indian "capital" and "revenue" moneys that are held by the Crown and "expended only for the benefit of the Indians or bands for whose use and benefit" they are received, with both the Governor in Council and the Minister of Indian Affairs exerting considerable authority over the use of those moneys. The *First Nations Oil and Gas and Moneys Management Act* (FNOGMMA)[20] enacted in 2005 authorizes opting-in First Nations communities that satisfy the legislation's prescribed processes to assume management over moneys held for their use and paid out of the Consolidated Revenue Fund.

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18 *Agreement for the Recognition of the Qalipu Mi'kmaq Band*, Federation of Newfoundland Indians and Government of Canada, 30 November 2007, http://www.qalipu.com/docs/Agreement-In-Principle.pdf.

19 S.C. 2005, c. 9.

20 S.C. 2005, c. 48.

Under the legislation, the *Indian Act* regime ceases to apply to those moneys. FNOGMMA also stipulates that the scheme does not apply to oil and gas moneys received following the transfer of oil and gas management to eligible communities, as well as providing for the non-application, as of the transfer date, of additional specified *Indian Act* provisions relating to contracts. It would appear that to date, no communities have been scheduled as participants under either of FNOGMMA's management options.

- Since 1977, section 67 of the *Canadian Human Rights Act* (CHRA)[21] has provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." The provision has prevented First Nations community members from gaining access to CHRA mechanisms with respect to decisions or actions authorized by the *Indian Act*, whether by the federal or First Nations governments, and has been seen as an impediment to full human rights protection. The Canadian Human Rights Commission has long advocated its repeal and, in its 2005 Special Report,[22] recommended immediate action toward that end.

  In 2006, government legislation to repeal section 67 was introduced. Before the House of Commons Standing Committee on Aboriginal Affairs, almost all non-government witnesses, although supporting the proposed repeal, were critical of Bill C-44 owing to a number of perceived inadequacies in both process and substance. The bill died on the *Order Paper* with the prorogation of Parliament in September 2007 and was reintroduced as Bill C-21 in November 2007. The House Committee amended the legislation to incorporate interpretive and non-derogation provisions, as well as an expanded transition time prior to implementation with respect to complaints against First Nations governments. Bill C-21 passed the House of Commons and the Senate in May and June 2008 respectively, with immediate effect against the federal government.[23]

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21 R.S.C. 1985, c. H-6.

22 Canadian Human Rights Commission, *A Matter of Rights – A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the "Canadian Human Rights Act,"* October 2005, http://www.chrc-ccdp.ca/pdf/report_a_matter_of_rights_en.pdf.

23 *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30.

- In addition to legislative initiatives, over the years a number of challenges to the Act's status and membership provisions have been working their way through the Canadian judicial system. Court cases are largely concerned with the effects of 1985 amendments in those areas enacted by Bill C-31, An Act to amend the Indian Act, which, although intended to remove longstanding gender discrimination in registration provisions and restore status, resulted in complicated status categories and restrictions on status. A particular source of grievance is the "second generation cut-off rule" under which status is lost after two successive generations of intermarriage between Indians and non-Indians, but which has a more severe impact on the ability of First Nations women with restored status to transmit that status. Under Bill C-31, Indian status also became distinct from band membership for the first time, as First Nations communities were authorized to assume control of membership.

  Noteworthy proceedings include the Sawridge case, in which a challenge by two Alberta First Nations communities to the constitutionality of Bill C-31 membership provisions under section 35 of the *Constitution Act, 1982* has been under way before the Federal Court and the Federal Court of Appeal since 1986. In April 2009, the First Nations communities' appeal of a March 2008 Federal Court ruling dismissing their action was itself dismissed;[24] on 19 June 2009, the communities applied for leave to appeal this decision.[25] In the precedent-setting June 2007 *McIvor* decision,[26] the British Columbia Supreme Court allowed a section 15 Charter claim alleging ongoing discrimination on the basis of sex and marital status arising from Bill C-31 registration provisions. In April 2009, the federal government's appeal was dismissed by the BC Court of Appeal which, while upholding the Charter infringement, ruled that a narrower population was affected by it.[27] In response to the Court's suspended declaration of invalidity of the offending sections of the *Indian Act* for one year the Minister of Indian Affairs announced on 2 June 2009 that the government would not be appealing the

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24 *Sawridge Band* v. *Her Majesty The Queen et al*; *Tsuu T'ina First Nation* v. *Her Majesty The Queen et al.*, 2009 FCA 123, http://decisions.fca-caf.gc.ca/en/2009/2009fca123/2009fca123.pdf.

25 Supreme Court of Canada File No. 33219.

26 *McIvor* v. *The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, 8 June 2007, http://www.courts.gov.bc.ca/jdb-txt/sc/07/08/2007bcsc0827.htm.

27 *McIvor* v. *Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 6 April 2009, http://www.courts.gov.bc.ca/jdb-txt/CA/09/01/2009BCCA0153.htm.

McIvor decision, and would develop amendments consistent with the Court's order.[28] On 4 June 2009, Ms. McIvor applied to the Supreme Court of Canada for leave to appeal the appellate decision.[29] On 5 November 2009, the High Court dismissed her application; government legislation to amend *Indian Act* registration provisions is anticipated in the near future, if it is to be in place by 6 April 2010.

Other Bill C-31 cases continue to work their way through the courts.

- In May 2009, the Standing Senate Committee on Aboriginal Peoples began a study to consider issues related to the *Indian Act* electoral scheme for the election of First Nations communities Chiefs and councils. Particular topics of interest include the impact of the two-year term of office currently prescribed by the *Indian Act*, as well as the establishment of fixed or "common day" elections, and the possible use of removal or recall mechanisms should terms of office be extended.

OUTSTANDING MATTERS

The reactions of First Nations people to the proposed First Nations Governance Act in 2003 highlight the sensitivity and complexity of legislative initiatives related to the *Indian Act* as well as First Nations' objective of involvement in designing any reform package.

As is evident from the above review, over the past several years, other enactments have directly or indirectly affected the operation of the *Indian Act* in a number of areas, such as land management and education. Some maintain that sector-specific optional initiatives of this nature effect a piecemeal dismantling of the Act, resulting in a complex patchwork of legislative schemes that may operate to the advantage of some but that may fail to benefit a majority of First Nations communities across the country.

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28 Department of Indian Affairs and Northern Development, "Government of Canada to amend Indian Act in Wake of Landmark BC Ruling," News release, Ottawa, 2 June 2009, http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2009/nr000000339-eng.asp. In August 2009, the department announced its engagement plan for the development of amendments, and released a discussion paper entitled "Changes to the *Indian Act* affecting Indian Registration and Band Membership: McIvor v. Canada" that sets out the government's intended approach and seeks feedback on it: http://www.ainc-inac.gc.ca/br/is/mci-eng.pdf.

29 Supreme Court of Canada File No. 33201.

Whether or when government policy may result in additional legislative measures of a similar or broader scope remains to be determined. Any future education agreements of the sort reached with Nova Scotia and British Columbia communities would be given effect by government legislation. It would also appear that amendments to the *Indian Act*'s electoral scheme could be introduced with specific reference, in particular to the Act's current provision for a two-year term of elected office. The timing of amendments to the Act's registration provisions, mandated by the BC Court of Appeal to be put in place by April 2010, will likely depend on whether and when the *McIvor* appeal proceeds before the Supreme Court of Canada, and the outcome of any ruling by the High Court.

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